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CASE NO. 92-1963

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

JOSHUA ANDHOGA,

PETITIONER

V.

IMMIGRATION AND NATURALIZATION SERVICE,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joshua Andhoga
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Arlington, Texas 76010
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Pro Se

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Question Presented for Review

The Board of Immigration Appeals (BIA) elected against having a transcript made of an immigration court hearing, ruling that Petitioner had filed his notice of appeal appeal late. However, the Board of Immigration Appeals based its decision, in part, on a factual determination that Petitioner was not entitled to the discretionary relief requested (suspensions of deportation). The question thus presented is whether the absence of the transcript from the record deprived Petitioner of procedural due process.

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TABLE OF AUTHORITIES

CASES

Barlow v. Collins, 397 U.S. 159

STATUTES

Section 106 of the Immigration and Naturalization Act, 8 U.S.C §1105a

STATEMENT OF JURISDICTION

The decision of the Fifth Circuit Court of Appeals was rendered on February 26, 1993 and is reprinted in the Appendix. This is a petition for writ of certiorari from that decision. The jurisdiction of this Court is invoked pursuant to 28 U.S.C §1254(1).

Section 106 of the Immigration and Naturalization Act, 8 U.S.C. §1105a provided the statutory basis for an appeal to the Fifth Circuit from the decision of the Board of Immigration Appeals. It is set out in the appendix.

Petitioner originally sought relief under Section 244(a) of the Act, 8 U.S.C. §1254(a). It is set out in the appendix.

STATEMENT OF THE CASE

The petitioner is a native and citizen of Kenya. The petitioner entered the United States in May 1982 as a nonimmigrant student.

This matter was initiated by the Service on July 18, 1989 when it filed an Order to Show Cause with the Immigration Court in Dallas, Texas. In this Order the Service alleged that Petitioner was admitted as a nonimmigrant student and was authorized to remain in the United States for duration of status; that he failed to pursue a full course of study; and that he was employed, without permission, as a dishwasher from June 12, 1989; and that all these allegations constituted a violation of Section 241(a)(9) of the Immigration Act.

Petitioner filed an Application for Suspension of Deportation on April 11, 1990. Judge Edwin R. Hughes of Dallas, Texas denied the application for Suspension

and issued his Memorandum of Oral Decision to that effect on June 28, 1990. On July 23, 1990, Petitioner filed his Notice of Appeal. On July 23, 1990, the Executive Office of Immigration Review (EOIR), Office of Immigration Judge, (OIJ) issued a memorandum to the EOIR, Board of Immigration Appeals, stating that Petitioner's appeal was untimely made and requesting instructions from the Board as to whether a transcript is necessary. On October 26, 1990, the Board of Immigration Appeals dismissed the appeal stating that it was untimely.

On May 23, 1991, Petitioner filed a Motion to Reopen/Reconsider with EOIR, OIJ. By decision dated December 2, 1991, the BIA denied Petitioner's May 1991 Motion to Reopen or Reconsider.

On February 25, 1992, Petitioner filed a Motion to Re-Open/Re-Consider, and on March 3, 1992, Petitioner filed supplementary materials to his Motion to Reopen. On

March 10, 1992, the Immigration Judge issued an order denying Petitioner's February motion to reopen. On March 23, 1992, Petitioner filed a Notice of Appeal to the BIA. By decision dated May 7, 1992, the BIA dismissed Petitioner's appeal. Appeal to the Fifth Circuit was then taken, and the Fifth Circuit rendered its decision on February 26, 1993 dismissing Petitioner's petiton.

The Fifth Circuit had jurisdiction of this case pursuant to Section 106(a) and (a)(1) of the Immigration and Naturalization Act, 8 U.S.C. §1105a(a) (a)(1).

REASONS FOR GRANTING THE WRIT

This case concerns a question of procedural due process. It is submitted that the Fifth Circuit erred when it failed to address Petitioner's point of error about the failure of the BIA to bring up

the transcript from the Immigration Judge for review. It is a fundamental rule of fairness that a reviewing agency cannot make an informed decision unless it has the full transcipt before it. The failure of the Fifth Circuit to enforce this rule has resulted in a fundamental compromise of Petitioner's procedural due process rights.

When fundamental due process rights are implicated, it is imperative that a strict standard of review should be applied. See Barlow v.Collins, 397 U.S. 159. For this reason Petitioner prays that this Court grant his writ of certiorari so that the issue of procedural due process may be reviewed.

WHEREFORE, Petitioner prays that this petition be granted.

Respectfully submitted,

Joshua Andhoga
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Certificate of Service

I certify that three true and correct copies of the foregoing have been served on the Immigration and Naturalization Service this 27th day of May, 1993, at the following address: Anne C. Arries, Attorney, Office of Immigration Litigation, Civil Division, Department of Justice, Post Office Box 878, Ben Franklin Station, Washington, D.C. 20044, 202 501-7361.

Joshua Andhoga